Jack in the Box Distribution Center Systems *and* Douglas Carnahan. Case 19–CA–27597

May 19, 2003

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND WALSH

On April 5, 2002, Administrative Law Judge Lana H. Parke issued the attached decision. The Respondent filed exceptions, a supporting brief, and an affidavit. The General Counsel filed a motion to strike the Respondent's exceptions, brief, and affidavit and the Respondent filed a response.[1] The General Counsel also filed cross-exceptions, a supporting brief, and an answering brief to the Respondent's exceptions. The Respondent filed both an answering brief to the General Counsel's cross-exceptions and a brief in reply to the General Counsel's answering brief. The General Counsel filed a reply brief to the Respondent's answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs[2] and has decided to affirm the judge's rulings, findings, and conclusions[3] and to adopt the recommended Order as modified and set forth in full below.

We find merit in the General Counsel's cross-exceptions to the judge's failure to extend the remedy for the unlawful manual provision to the six additional distribution sites where the same provision was maintained. The Respondent did not except to the judge's finding that its handbook provision, entitled "Inquiries by Government Representative," violated Section 8(a)(1) of the Act because it restrained and coerced employees in their access to Board procedures by prohibiting them from providing information to Federal agencies without company approval. At the hearing, the Respondent's witnesses testified that the provision is included in the handbook given to each of its employees at its other facilities. Accordingly, we deem it an appropriate remedial measure to require that the rescission of the provision, and the posting of the notice, be coextensive with the Respondent's application of its handbook. See *Dai-Ichi Hotel Saipan Beach*, 337 NLRB 469, 474 (2002); *Kinder-Care Learning Centers, Inc.*, 299 NLRB 1171, 1176 (1990).

AMENDED REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order the Respondent to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

We shall order the Respondent to rescind the provision entitled "Inquiries by Government Representative" in its employee handbook that prohibits employees from providing information or testimony to governmental agencies without approval from the Respondent. In addition, because the Respondent has maintained its employee handbook at all its distribution centers, we shall order the Respondent to modify the handbook by deleting the provision that we have found to be unlawful and to post an appropriate Board notice to employees at all its centers where this handbook has been or is in effect.

We shall also order the Respondent to make employees Douglas Carnahan and Scott Miller whole for any loss of earnings and other benefits they may have suffered as a result of their unlawful discharges, from the date of their discharges on May 10, 2001, less any net interim earnings, to be computed in the manner as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). We also shall order the Respondent to remove from its records any references to the unlawful discharges of Carnahan and Miller, provide them with written notice of such removal, and inform

[1] The General Counsel moved to strike the Respondent's exceptions on the grounds that they do not comply with Sec. 102.46(c) of the Board's Rules and Regulations because they do not reference the specific section of the administrative law judge's decision to which the exception is made and do not designate the portion of the record relied on. We find, however, that the Respondent's exceptions and supporting brief are in substantial compliance with the Board's Rule. The General Counsel also moved to strike an affidavit (an exhibit rejected by the administrative law judge at the hearing and included in the rejected exhibit file) and the references to the affidavit in the Respondent's brief. We do not rely on the affidavit in reaching our decision in this case. Accordingly, we deny the General Counsel's motion to strike in its entirety.

[2] The Respondent's motion for oral argument is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[3] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The General Counsel excepts to the administrative law judge's failure to find that the statement by Respondent's manager, Greg Martinez, that the Respondent would close the company and deliver out of California if there was a threat of union organizing, violated Sec. 8(a)(1) of the Act. We find no merit in this exception. At the hearing, counsel for the General Counsel specifically stated that this evidence was being offered as background evidence of animus. The statement was not alleged as a violation of Sec. 8(a)(1) in the complaint. Nor was there an amendment to the complaint at the hearing. Accordingly, the Respondent was not put on notice that the conduct was being attacked as unlawful. Under these circumstances, we decline to find that the conduct constituted an additional violation of Sec. 8(a)(1) of the Act.

them that their unlawful discharges will not be used as a basis for future personnel actions concerning them.

ORDER

The National Labor Relations Board orders that the Respondent, Jack in the Box Distribution Center Systems, Algona, Washington, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining a provision in its employee handbook that prohibits employees from providing information or giving testimony to governmental agencies without the Respondent's approval.

(b) Discharging or otherwise discriminating against employees because they engage in union or other concerted activity protected by the Act.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Remove from its employee handbook in effect at all its distribution centers the provision prohibiting employees from providing information or giving testimony to governmental agencies without the Respondent's approval.

(b) Within 14 days from the date of this Order, offer Douglas Carnahan and Scott Miller full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(c) Make Douglas Carnahan and Scott Miller whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of this decision.

(d) Within 14 days from the date of this Order remove from its files any reference to the unlawful discharges, and within 3 days thereafter notify Douglas Carnahan and Scott Miller in writing that this has been done and that the discharges will not be used against them in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its Algona, Washington distribution center, copies of the attached notice marked "Appendix A" and, at each of its other distribution centers where its employee handbook has been or is in effect, copies of the attached notice marked "Appendix B."[4] Copies of the notices, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 10, 2001.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain a provision in our employee handbook that prohibits you from providing information or giving testimony to governmental agencies without our approval.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT discharge or otherwise discriminate against you because you engage in union or other concerted activity that is protected by Section 7 of the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL remove from our employee handbook at all our distribution centers the provision prohibiting you from providing information or giving testimony to governmental agencies without our approval.

WE WILL, within 14 days from the date of the Board's Order, offer Douglas Carnahan and Scott Miller full reinstatement to their former jobs, or if those jobs no longer exist, to substantially equivalent positions without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Douglas Carnahan and Scott Miller whole for the losses incurred as a result of the discrimination against them, with interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the discharges of Douglas Carnahan and Scott Miller, and WE WILL, within 3 days thereafter we will notify them in writing that this has been done and that the discharges will not be used against them in any way.

JACK IN THE BOX DISTRIBUTION CENTER SYSTEMS

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain a provision in our employee handbook that prohibits you from providing information or giving testimony to governmental agencies without our approval.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL remove from our employee handbook at all our distribution centers the provision prohibiting you from providing information or giving testimony to governmental agencies without our approval.

JACK IN THE BOX DISTRIBUTION CENTER SYSTEMS

Martin Eskenazi, Esq., for the General Counsel
James Foster and *Jeff Hackney (McMahon & Berger)*, of St. Louis, Missouri, for the Respondent

DECISION

STATEMENT OF THE CASE

LANA PARKE, Administrative Law Judge. Upon a complaint and notice of hearing issued September 21, 2001,[1] trial was held In Seattle, Washington, on January 28 through 31, 2002. The complaint charges that Jack in the Box Distribution Center Systems (Respondent) terminated Douglas Carnahan (Carnahan or Charging Party) and Scott Miller (Miller) because they engaged in activities on behalf of International Brotherhood of Teamsters, Teamsters Local Union No. 117 (the Union) or in other concerted protected activities, and in order to discourage employees from engaging in such protected activities in violation of Section 8(a)(3) and (1) of the Act.

At the hearing, over Respondent's objection, I permitted the General Counsel to amend the complaint to allege that Respondent violated Section 8(a)(1) of the Act by maintaining a clause entitled " Inquiries by Government Representatives" in its employee handbook which interfered with and coerced employees in the exercise of their Section 7 rights, specifically the right to give testimony protected by Section 8(a)(4) of the Act.

Respondent contended that the proposed amendment did not relate to the underlying charge and constituted an undue burden on Respondent in defending against it. The employee handbook clause at issue, in part, sets the following restriction:

> Do not volunteer any information, or admit or deny the truthfulness of any allegation or statement [an investigating representative of a Federal government agency] may make, nor sign any written statements, such as reports or affidavits, without express approval from a company attorney.

During the course of the hearing, employees Ken Harnden (Harnden) and Kevin Trombley (Trombley) testified they were reluctant to give testimony at the hearing because of the handbook provision. Each testified under subpoena and, upon request by the General Counsel, was given assurances that his right to do so was protected by Federal law.

The Supreme Court has held that "the Board is not precluded from 'dealing adequately with the unfair labor practices which are related to those alleged in the charge and which grow out of

[1] All dates are in 2001 unless otherwise indicated.

them while the proceeding is pending before the Board.'" *NLRB v. Fant Milling Co.*, 360 U.S. 301, 309 (1959). The test for adding otherwise untimely allegations to an outstanding complaint is stated in *Redd-I, Inc*., 290 NLRB 1115, 1115–1116 (1988). See also *Canned Foods, Inc.*, 332 NLRB 1449 (2000); *Nickles Bakery*, 296 NLRB 927 (1989). It is true that the amendment allegation does not meet the specific test criteria: involve the same legal theory, arise out of the same factual situation, or raise similar defenses as the allegation in the underlying charge. Nevertheless, I conclude the issue addressed in the amendment is closely related to the complaint allegations. The amended allegation relates to the willingness of witnesses to give testimony in the instant matter and to the very ability of the General Counsel to present evidence concerning the underlying charge. The alleged unfair labor practice thus both grows out of and affects presentation of the complaint issues. Accordingly, I find it is appropriate to resolve the amendment allegation at the same time as the subject matter of the charge. There is no question of tolling the time limitations of Section 10(b) since Respondent continued to maintain the provision through the dates of the hearing,[2] and, as the issue covered by the amendment is essentially a legal rather than a factual one, Respondent is not unduly burdened by defending it.

By motion dated March 19, 2002, Respondent seeks to strike portions of the General Counsel's brief, i.e., the appendix to the brief and the argument that Carnahan and Miller were terminated illegally in retaliation for the concerted protected activity of filing complaints. Respondent argues that the appendix contains computations and assumptions not established in the record and that the concerted protected activity allegation was not pleaded in the complaint. The evidence underlying the computations in the General Counsel's brief is in the record. The computations and inferences in the appendix constitute legitimate argument. Moreover, I have not found it necessary to rely on that evidence in reaching my decision. As for the latter contention, the charge alleges that Respondent discharged Carnahan and Miller because of their union and other protected concerted activities. Paragraph 5(b) of the complaint alleges, inter alia, that the discharges of Carnahan and Miller occurred because the two employees engaged in union or other concerted activities for the purposes of collective bargaining or other mutual aid or protection. The pleadings, therefore, describe both union and other protected concerted activity. The General Counsel's opening statement also identified animosity toward the employees' hotline complaints as a basis for Respondent's unlawful conduct. Finally, the discharges were fully litigated without respect to theory of illegality, and the remedy is the same regardless of the underlying theory. Accordingly, I deny the motion.

[2] In April, Respondent informed employees that the employee handbook was being revised, and counsel for Respondent represented that a revised handbook excluding the targeted provision was being printed. However, Respondent never communicated to employees that the provision was no longer operative. As of the hearing date, so far as employees knew, Respondent continued to maintain the provision.

Issues

1. Did Respondent violate Section 8(a)(3) and (1) of the Act by terminating Carnahan because he supported the Union or engaged in other protected concerted activity and in order to discourage other employees from engaging in such activities?

2. Did Respondent violate Section 8(a)(3) and (1) of the Act by terminating Miller because he supported the Union or engaged in other protected concerted activity and in order to discourage other employees from engaging in such activities?

3. Did Respondent violate Section 8(a)(1) of the Act by maintaining a provision entitled "Inquiries by Government Representatives" in its employee handbook?

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a Delaware corporation, with an office and place of business in Algona, Washington (the facility), is engaged there in the fast food distribution business.[3] In the 12-month period ending September 21, Respondent had gross sales of goods and services in excess of $500,000 and purchased and received at its Washington facility, products, goods, and materials valued in excess of $5000 directly from points located outside the State of Washington, or from suppliers within the State which in turn obtained such goods and materials from sources outside the State. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

1. Evidence of union animus

At times relevant hereto, Respondent has employed drivers and warehouse workers at the facility. Prior to November 2000, Carnahan and Miller worked there as drivers under the immediate supervision of Jack Templeton (Templeton), warehouse and transportation supervisor, and the general supervision of Frank Luna (Luna), general manager. In November 2000, Greg Martinez (Martinez) replaced Luna as general manager. On January 2, Respondent fired Templeton for misuse of a company credit card. Driver Richard Connell (Connell) was promoted to transportation supervisor on March 18.

There is no allegation or evidence that Respondent was guilty of expressing union animus during the 6-month period prior to the filing of the charge. However, the General Counsel presented evidence of various statements made outside the 10(b) period purporting to show the existence of animus or opposition to union organizing.

Templeton, Carnahan, and Miller credibly testified that sometime in early 2000 they participated with Luna in inter-

[3] Where not otherwise noted, the findings herein are based on the pleadings, the stipulations of counsel, and/or unchallenged credible evidence.

viewing a driver applicant. Although Carnahan and Miller thought the applicant well qualified, Luna refused to hire him, saying he thought the applicant was a union plant. Luna denied any such motivation, stating that the applicant's negativity prompted the rejection.[4]

In June or July 2000, Templeton reported to Miller and Carnahan that a labor attorney had addressed Respondent's management meeting and told the attending managers how to defend against union organizing.

Carnahan credibly testified that in October or November 2000, Luna told him that employee Joe Johanson seemed very prounion, and if he mentioned anything about a union, Carnahan was to call him or John Watt (Watt), Respondent's division vice president responsible for distribution. He gave Watt's card to Carnahan.

Carnahan credibly testified that at the end of 2000 or beginning of 2001, he told Luna he was concerned about how Martinez would handle the facility and that employees might "have to get organized." Luna told him that kind of talk could cost him his job.

Miller credibly testified that in January or February 2001, Martinez told him that if there were a threat of union organizing at the facility, Respondent would close it and deliver out of California.

Trombley credibly testified that in October or November 1999, Luna refused to permit him to sell gloves to other employees, saying that if Respondent permitted it, they would have to permit union solicitation, and the Company could not have that.

2. The union organizational effort

Beginning in February, Carnahan and Miller discussed among themselves and with other drivers concerns about pay, health care, and the possibility that Respondent would close the facility. They also discussed unionization. Between February and April 1, the two approached all but one of the other drivers. In late March or early April, Carnahan telephoned the Union and spoke to organizer Leonard A. Smith (Smith). Smith met with Carnahan and Miller at a local restaurant on April 21 to discuss a union campaign. At that meeting and in followup telephone calls, Smith suggested the two drivers involve the warehouse workers in the union campaign. Smith held a second meeting on April 25, which two warehouse employees attended along with Carnahan and Miller.

On May 7, Carnahan, in company with Steve and Ray Sandy, father and son respectively, who were relatives of Luna and influential with employees, attended a third meeting with Smith. Following the third meeting, Carnahan and Smith spoke regularly, but after Carnahan and Miller's discharges, the union campaign essentially ended.

3. The terminations of Carnahan and Miller

At the time of their terminations, Respondent had employed Carnahan for over 8 years and Miller for over 6. They were, respectively, first and second in driver seniority. There is no dispute that Carnahan and Miller were excellent drivers, consistently receiving high evaluations and other recognition.

Commencing sometime in 1999, Carnahan and Miller assisted Templeton, as needed, in minor managerial matters and office duties (managerial work.) According to Templeton, Carnahan and Miller were initially compensated for the managerial work at $1-an-hour differential pay. Later, Templeton expanded the duties of Carnahan and Miller to include reviewing logbooks, working on the CADEC mainframe,[5] scheduling employees, setting up back hauls,[6] joining in employment applicant interviews, and handling driver problems. Carnahan and Miller pointed out to Templeton that they were assuming a lot of responsibility, and they felt they should receive a fairer compensation for doing managerial work than $1-an-hour differential pay.

Templeton reported the conversation to Luna and recommended that Carnahan and Miller receive higher differential pay. After discussion, Luna and Templeton agreed that Carnahan and Miller should be compensated an additional $3 per hour when performing managerial work. Work of lesser responsibility, i.e., not the full range of managerial work, was compensated at a differential rate lower than $3 per hour. The method of determining the differential pay was imprecise, unsystematic, and altogether discretionary. According to Templeton, he and Luna "knew" what days the two employees had done managerial work, and relied on the two employees to report their managerial work hours. Templeton testified, "[Luna] would just write down what he felt that person worked . . . If it was wrong, they would fix it on the next one. When I did it, I was more exact . . . ." [7] Although the method of determining differential hours was imprecise, it was clear what type of work earned differential pay. According to Templeton, work that involved supervising other people and managerial work performed in his absence was always compensated at $3-per-hour differential pay.

Templeton, Carnahan, and Miller testified that the managerial work performed by Carnahan and Miller included time spent handling problems telephonically while otherwise off duty or when performing regular driver work. When Carnahan and Miller handled employee questions/problems from home, the compensation combined their hourly rate of $17.90 with a $3-differential rate. The arrangement was for Carnahan and Miller to keep track of their telephone managerial time. In its brief, Respondent argues that any telephone calls were minimal, pointing out that Templeton testified managerial telephone calls generally lasted about 10 minutes. In selecting that testi-

[4] I credit the accounts of Templeton, Carnahan, and Miller. I did not find Luna to be a convincing witness. I note that Templeton is no longer with Respondent and may be considered a neutral witness. Although the circumstances of Templeton's termination might arguably form a basis for bias, Templeton did not demonstrate any bias and there was no extrinsic evidence of it. Templeton's manner and demeanor impressed me as to his sincerity and accuracy.

[5] The CADEC is a computer system installed on Respondent's delivery trucks that records start and stop times, travel speed, etc.

[6] A back haul is transporting product from an outside vendor to Respondent's warehouse.

[7] Templeton testified that Luna occasionally paid Carnahan and Miller a differential higher than $3 an hour. Sometimes he paid them $5 per hour.

mony, Respondent is somewhat disingenuous. Templeton's fuller testimony on this point is as follows:

> [S]ometimes you could get a telephone call and it could take you 10 minutes or even a minute to deal with it. Sometimes you get a phone call and you could be on the phone calling all these people . . . if it's a big thing. And it could take you hours, if it's that serious . . . I got phone calls continuously. Almost every day, I got phone calls away from work. Because we're almost a 24-hour Facility and you only have one supervisor . . . On an average, it would be at least 3 [phone calls a day.] . . . [The time spent] could be . . . 10 minutes. Depending on the crisis. They vary.

No documentation was kept for either the managerial work at the facility or the managerial work away from the facility. According to Carnahan and Miller, prior to Templeton's discharge, they reported to him the amount of time each had spent handling problems telephonically, and Templeton told them what to add in as differential pay. Luna, as the distribution manager, reviewed timecards for each biweekly pay period.

Miller testified there is no way of ascertaining the formula used in computing the differential pay from looking at the timecards. A number of variables contributed to determination of the final sum, none of which was noted on timecards or any other documents. It appears, however, that Respondent recognized the time spent in managerial duties was significant. A notation on Miller's October 2, 2000 evaluation reads, "Works many extra hours/doing office work." Both Templeton and Luna signed the evaluation.

In contrast to the above testimony, Luna testified that he only agreed to pay Carnahan and Miller $1 differential for managerial duties at work and that such work did not include work performed away from the facility, including telephone work. I do not accept Luna's testimony in this regard. Not only did I find Luna's manner and demeanor while testifying to be unprepossessing, I note that Luna was responsible for reviewing the timecards. Even a cursory review must have revealed that Carnahan's and Miller's recorded differential pay was reimbursed at an amount greater than $1 an hour. Moreover, under cross-examination, Luna tacitly admitted that Carnahan and Miller were paid for managerial telephone calls:

> Q. You never raised any issues or problems with [Carnahan and Miller's] timecards, correct?
>
> A. True.
>
> Q. You never told them they needed to do things differently on their timecards?
>
> A. Not that I recall, no.
>
> Q. You never told them there were problems with the pay adjusts?
>
> A. No.
>
> Q. You never told them they had spent too long or put in too much time for a phone call?
>
> A. No, because they were getting the $1 an hour extra.

Based on the inconsistencies in Luna's testimony and his manner and demeanor, I find Carnahan's, Miller's, and Templeton's testimony to be more convincing than Luna's. I conclude Respondent agreed to reimburse the two employees at $3 per hour when they performed managerial work, including telephone troubleshooting.

When Luna was replaced by Martinez, Templeton informed Martinez that Carnahan and Miller had been paid a differential of $3 when performing managerial duties. Martinez said that if Luna had agreed to that amount, it would be continued.

Carnahan and Miller were not the only employees receiving compensation for managerial work. Kerry Fischer (Fischer) did managerial oversight of the warehouse as needed and was compensated for that over and above his normal hourly pay through a timecard subterfuge. In order to compensate him beyond his regular $16.75 per hour, Luna had Fischer write on his timecard that he had worked 5 hours each Saturday. Respondent paid him overtime for the 5 hours. Although he performed no work on Saturdays, Fischer was thereby compensated $83.75 biweekly. No one correlated Fischer's compensation to actual time spent performing supervisory duties.

When Respondent fired Templeton on January 2, Carnahan and Miller assumed his duties. Martinez asked Carnahan and Miller to schedule other drivers to do their routes because he wanted either Carnahan or Miller in the office at all times. Thereafter, Carnahan's and Miller's managerial/office duties increased substantially. Although both employees still drove runs as needed, Carnahan credibly testified that he carried the supervisory cell phone with him and fielded employee calls during the runs. He understood he was to receive the differential pay for the time that he handled employee problems by phone during his runs.

Harnden testified that after Templeton was fired, Carnahan and Miller worked in the office every day, and other employees covered their loading assignments. Trombley also testified that after Templeton was terminated, Carnahan spent 4 to 5 days a week in the office and Miller spent 2 to 3 days a week there. Trombley said that when Carnahan and Miller worked in the office, other employees usually covered their loading duties and sometimes their driving routes. Trombley covered Carnahan's or Miller's driving routes three or four times between January and May. On those occasions, Carnahan's or Miller's name appeared on the assigned route although another driver did the work. Trombley said that, using Respondent's supervisory cell phone number, he called Carnahan and Miller at home concerning work problems. Harnden also testified that after Templeton was fired, other employees covered Carnahan's and Miller's loading assignments.

Martinez testified that neither Carnahan nor Miller did any more work after Templeton's departure than before. I cannot accept that testimony. Not only does it conflict with all other testimony on the subject, Martinez' manner and demeanor were not convincing, and I find his testimony to be illogical and unreliable. If Carnahan and Miller took over Templeton's duties, as is uncontroverted, it is truistically improbable that they did no more managerial/office work than they had before.

Respondent posted the supervisory position vacated by Templeton. Carnahan and Miller both expressed interest in the position to Martinez. Upon learning that starting pay was

$42,000 a year (substantially less than they and eight other drivers were making[8]), they declined to make application.

On March 30, an anonymous caller telephoned the company-wide ethics hotline established by Respondent in 2000. The caller essentially complained that Connell had accused him of stealing time from the Company. The report was referred to Gary Hunter (Hunter), human resources training manager. Hunter telephoned Martinez and Connell and spoke to them for about 2 hours concerning the report.

On April 9, Miller telephoned the ethics hotline. According to the written report of Miller's call, Miller said he did not apply for the vacant supervisory position because "he had an issue with the money that was being offered." The bulk of the report concerned Miller's objections to certain supervisory practices of Connell including mixing local and mileage runs and changing overtime procedures. On April 17, Carnahan telephoned the ethics hotline. According to the written report of Carnahan's call, he complained of Connell's "harshness" as a supervisor, of his manipulating run assignments so as to reduce driver pay, and of his failure to pay overtime accurately.

Hunter testified that upon receiving Carnahan's and Miller's ethics hotline reports, he told Watt that Miller had reported he "was actually considered for a supervisor position but didn't take it." According to Hunter, he asked Watt for an explanation. Watt told him that the two employees had declined a supervisory position, as they would lose pay by taking it.[9] Hunter's testimony in this regard is somewhat inconsistent with that given under cross-examination where Hunter testified that Miller's ethics report stated that he did not take a supervisory position because he would have taken a decrease in pay, which piqued Hunter's interest and triggered the investigation. Neither account squares with the report. The written report of Miller's ethics hotline call says nothing about his having been considered for the supervisory position and nothing about the salary being a *decrease in pay*.[10] These inconsistencies reflect poorly on Hunter's credibility and render his testimony intrinsically unreliable.

Although, according to Raymond Pepper (Pepper), corporate counsel for Respondent, both Hunter and Watt in their respective positions knew what drivers' wages were, Hunter testified that he wondered what kind of money Carnahan and Miller could be making that becoming a supervisor would be a step down for them. In its brief, Respondent attempted to excuse Hunter's anomalous ignorance of employee pay rates by noting that Hunter was relatively new to his position and not yet familiar with driver pay statistics. Even assuming that explanation justifies Hunter's surprise, it cannot apply to Watt. There is no explanation as to why Watt did not inform Hunter of the long-existing pay disparity between some drivers and their immediate supervisors and why Hunter's concerns were not thereby dispelled. There is an inherent incongruity in this version of what prompted Respondent's investigation into Carnahan's and Miller's timecards, which Respondent has not resolved either by testimony or in its brief.

That is not the only inconsonance. Prior to the instant hearing, Martinez offered an entirely different version of what prompted the examination of Carnahan and Miller's timecards and differential pay. In Carnahan's state unemployment hearing on September 26, Martinez testified as follows:

> When I told Frank [Luna], who was the general manager previous to . . . me coming [to the Facility], he mentioned to me that he had never agreed on $3 an hour. He told me that it was only $1 an hour differential and I did bring it up to both Doug [Carnahan] and Scott [Miller] and they claimed that was incorrect and they had agreed on $3. And at that point that's when we started looking into the timecards and started investigating.[11]

Hunter testified that on April 17, he requested Carnahan's and Miller's timecards from the payroll department. Hunter talked to Watt about the adjustment pay on the timecards and learned that Carnahan and Miller were paid a differential for performing managerial work. At the instant hearing, Hunter testified that either Watt or Martinez told Hunter the differential was $3 an hour. In this regard, Hunter's testimony differed from that given at an unemployment hearing on August 8 where he testified only that Watt told him the differential was $3 an hour. I conclude that Watt, and not Martinez, was the communicant.[12] That being the case, it is clear that Respondent's upper management was aware that Carnahan and Miller were being paid $3-an-hour differential. Moreover, they knew of the $3-differential pay many months prior to commencement of any investigation.

On April 26, Hunter and Watt visited the facility. Hunter met with Carnahan and Miller concerning their ethics hotline reports. Hunter told them that other employees had registered concerns with the ethics hotline. Hunter talked to the two employees about complaints concerning Martinez and Connell. He said the two supervisors were new in their positions and feeling somewhat overwhelmed. According to Hunter, he asked Carnahan and Miller about their differential pay for do-

[8] Drivers' 2000 W-2 statements for Respondent's facility show the following annual wages:

Douglas Carnahan	$56,947.65	Charles Ostrander III	$37,662.20
Lester Clayton	51,921.41	Corey Patton	51,265.62
Richard Connell	24,253.27	Stephen Sandy	51,692.18
Patrick Crader	61,015.73	Eddie Simms	60,615.90
Gary Edwards	21,387.96	Todd Stoddard	71,989.81
Wayne Huet	14,056.78	Donald Templeton	71,888.46
Joseph Johansen	13,578.57	Kevin Trombley	52,047.40
Scott Miller	50,025.68	Ted Guddal	25,462.79

[9] It is not clear why Carnahan's name was broached; the written report of his hotline call is silent as to the supervisory position or its salary.

[10] In its brief, Respondent also inaccurately asserted that in his ethics hotline call, Miller "complained that the supervisor position did not pay enough compared to what he was making as a local driver and that he would have lost money if he had accepted it."

[11] I note that Martinez' September 26 testimony also expressly contradicts his testimony at the instant hearing where he unequivocally testified that he had never had any conversation with Luna as to whether Carnahan's and Miller's differential pay was $1 or $3 an hour. For this, and other stated reasons, I cannot find Martinez to be a credible witness.

[12] I note that Hunter's unemployment hearing testimony was given in much closer proximity to the events surrounding the discharges and is likely to be more accurate.

ing managerial work. They told him it was $3 an hour and that they received it only when working in the office. Hunter did not tell them they were under any investigation or ask for any other information or explanation from them. According to Hunter, he afterward asked Martinez how he could verify when Carnahan and Miller were driving as opposed to working in the office. Martinez said that driver route forms showed where drivers were at specific times.

Hunter was at Respondent's Texas facility from April 30 through May 2. He testified that while there, he asked Luna about the differential paid to Carnahan and Miller. According to Hunter, Luna told him that his agreement with the two employees was for a differential of only $1 an hour for managerial work.

Hunter compared Carnahan and Miller's timecards with driver route forms. Operating under the premise that all nonroute work hours at the facility constituted managerial work, Hunter subtracted each employee's driving or loading hours from the total hours worked to determine the hours the two employees had been doing managerial work. Multiplying Carnahan's nonroute work hours by $1 and $3, respectively, Hunter concluded that from December 25, 2000, through March 4, Carnahan had been overpaid a total of $197 at a differential pay of $3 and $745.75 at a differential pay of $1. Multiplying Miller's nonroute work hours by $1 and $3, respectively, Hunter concluded that from December 25, 2000, through March 4, Miller had been overpaid a total of $350 at a differential pay of $3 and $703.50 at a differential pay of $1. Hunter did not involve Martinez or Connell in this investigation even though Martinez was the general manager of the facility during the entire period at issue and Connell had been Carnahan and Miller's immediate supervisor since March 18. Respondent's failure to involve local management (who would reasonably be expected to possess pertinent information) was not explained.

According to Pepper, the investigation was completed on May 3. On May 4, Watt, Pepper, and Hunter met and discussed Hunter's analysis. They concluded that Carnahan and Miller had falsified their timecards. Respondent decided to terminate the two employees if they could provide no satisfactory explanation for their timecard data. The group agreed that Hunter should present the documentation he had gathered to Carnahan and Miller. "If they had a good explanation and they could break down what those hours were and where they came up with those numbers, then we would tell them that we were gonna continue the investigation. Otherwise if they couldn't come up with a good explanation then . . . I would pass the meeting over to Greg Martinez and he would terminate their employment." Pursuant to that plan, Hunter decided to meet with Carnahan and Miller on May 10 and so notified Martinez.

Luna testified that on May 6, Steve Sandy telephoned him at Respondent's distribution center in Texas. He told Luna he had been invited to attend a union meeting with Carnahan, Miller, and Ray Sandy. On the following day, May 7, Luna telephoned Watt and told him that an anonymous caller had informed him that he had been asked to attend a union meeting with Carnahan and Miller.

On May 8, Luna telephoned Watt again and told him that the anonymous caller had reported meeting with a union representative but said there was no interest in moving forward with any union activity. Watt reported the conversation to Pepper and Hunter.

In the instant hearing, Hunter admitted knowledge of Carnahan's and Miller's union activity before their terminations. However, in earlier testimony given at an unemployment hearing on August 8, Hunter testified that he had no personal knowledge of any union activities at the time Carnahan was terminated. Hunter attempted to reconcile his inconsistent testimony by saying he meant he had no personal, but only second hand, knowledge. I find Hunter's explanation sophistic and unreliable. I conclude that his inconsistency in this important area reflects badly on his overall credibility.

On May 9, at Hunter's request, Luna sent the following email to Hunter:

> Subject: Differential Pay
>
> The agreement that I remember in Algona for differential pay is as follows.
>
> You would receive an extra $1 an hour when.
>
> - Working in the office performing supervisor duties.
> - Scheduling backhauls.
> - Following up on maintenance repairs.
> - Reviewing log books.
> - Filling in for a supervisor.
>
> There would be no differential for driving or working in the warehouse. If you came into the office after a run, then you would receive extra pay from that point on. The only extra pay would be when you were actually performing supervisor duties.

On May 10, Hunter met individually with Carnahan and Miller. According to Hunter, each meeting lasted 15 to 20 minutes. Prior to the meetings, Hunter had prepared a list of questions and strategies to use during the interviews with Carnahan and Miller. Hunter testified that he followed this "script" during the interviews. The script reads:

> As you know we've been reviewing records including payroll records.
>
> Of course you know that our Company policy is "Zero Tolerance" for any falsifying of time records. Meaning termination would result in a case of that kind.
>
> Do you know of any reason time records may have been falsified or recorded incorrectly?
>
> The reason I ask is that we've found several problems with your timecards in regards to the Supervisor differential pay. Can you tell me why they would be so inaccurate?
>
> Frank's agreement with you was for $1 per hour during supervisor duties only.
>
> Examples
>
> Can you explain this?
>
> (In the case that no good explanation is forthcoming, I will turn the situation over to Greg for Termination.)
>
> (In the case that a believable explanation is given, I will turn the situation over to Greg for the following explanation.)

> You are going to be suspended until the investigation is completed, but be aware that if we find against you, you will be terminated. If you would prefer to resign during that time we will accept that option.

During the interview with Carnahan, Hunter presented him with the collected timecards and route sheets and asked him to explain how the differential amounts were arrived at. Carnahan said the handwriting on the timecard for the pay period ending January 7 was not his. Hunter told him that was not a good enough explanation. Hunter testified, "[Carnahan] . . . went to well I did a lot of other work. I took phone calls at home and I did this and did that and came up with other explanations . . . after we talked about it for a few minutes I was satisfied that he didn't have the kind of answer I was looking for." Hunter turned the meeting over to Martinez who terminated Carnahan. According to Hunter the meeting lasted 15 to 20 minutes.

Carnahan testified that on May 10 after finishing his run, Connell asked him to go to the conference room. Present were Hunter, Martinez, and Connell. The group had copies of Carnahan's timecards and other documents. Hunter focused on Carnahan's timecards, stating that too much time had been written in for differential or adjustment pay at $3 an hour. Hunter showed Carnahan Respondent's analysis of his route and work assignments, which, said Hunter, showed that Carnahan could not have performed the managerial work claimed. Carnahan pointed out that he had not always performed the loading or driving work listed but had performed managerial work instead and turned the regular work over to other employees. Carnahan testified that he tried to explain to the group that determining the differential or adjustment pay had not been an exact science but had been based on a general estimation of the managerial hours worked. The group responded that if the amount was off by as little as $1, it constituted falsification of the timecard and grounds for termination. Carnahan testified that the group did not appear to want to listen to his explanations.

Hunter testified that his interview with Miller on May 10 proceeded along the same lines as Carnahan's. Hunter went through his list of questions with Miller. According to Hunter, Miller also denied that some of the pay differential writing was his and stated that he had worked numerous other hours at home taking telephone calls. As Miller's responses were not satisfactory to Hunter, he turned the meeting over to Martinez who terminated Miller. This meeting, like Carnahan's, lasted 15 to 20 minutes.

Concerning his May 10 meeting with Hunter, Miller testified that, following completion of his driving route, he was asked to report to the conference room. Present were Kerry Fischer (Fischer), Warehouse Supervisor Martinez, Connell, and Hunter. Copies of route forms and timecards were spread out on the desk. Hunter said that Respondent had been reviewing payroll records and that company policy was zero tolerance for falsification of time records. Focusing on the time records of January through March 2001, he told Miller that he had found several problems with his timecards in regard to the differential pay, and asked if Miller could explain why they were so inaccurate. Miller told him that some of the handwriting on the route forms was not his. Miller told Hunter that he had worked the hours claimed doing managerial work, which work was compensated at a $3 differential. Miller told Hunter that documents showing him doing loading work 1 to 2 hours each day following Templeton's discharge were inaccurate. Following Templeton's discharge, Miller told the group, he had performed only rare loading work, doing managerial work instead. Miller also explained that he and Carnahan had been required to carry cell phones at all times to be available to deal with driver problems, which could occur at any time during the 24-hour operation. Miller told them that Templeton had instructed the two to add their telephone time into the hours claimed for differential pay. Hunter told Miller that it was not possible to work as many managerial hours as claimed while also making deliveries. Miller told them that the route records might show runs assigned to him which were actually performed by another driver, especially after Templeton was discharged and his supervisor duties fell to Carnahan and Miller.[13] According to Miller, "Every time that I explained something [the supervisors] went on to the next thing. There was no response after my response. They didn't do any followup questions or anything."

[13] Miller credibly testified that the reassignments were posted as new schedules, and although the new schedules were filed at the facility, he did not keep copies of them or have access to them. In its brief, Respondent points out that no documents were produced showing that Carnahan and Miller did not drive their scheduled routes. The new schedules, which may have cast light on this question, are in Respondent's control. Respondent did not refute their existence, produce the schedules, or explain its failure to do so. Any adverse inference from the absence of documents must, therefore, be drawn against Respondent.

4. Pay differential amounts paid to Carnahan and Miller from 1999 to April

SUMMARY OF OTHER PAY (TIMECARDS OF DOUGLAS CARNAHAN)					
Pay Period	Regular Hours	Over-time Hours	Other Pay:		Mgr's Approval Signature
			Explanation	Amount	
8/20/00	64	20.75	16 hrs floaters	$ 200.26	Jeff Templeton
9/03/00	80	24.25	-none-		Jeff Templeton
9/17/00	48	13.5	shift differential	100.00	Jeff Templeton
10/15/00	80	37.75	shift differential	140.50	Jeff Templeton
10/29/00	80	28.75	shift differential	197.00	Jeff Templeton
11/12/00	58	11	shift differential	72.00	Jeff Templeton
11/26/00	80	30.5	-none-		Jeff Templeton
12/10/00	80	8	-none-		Greg Martinez
12/24/00	80	29	-none-		Jeff Templeton
1/07/00	80	23.75	pay adjustment	240.00	Scott Miller
1/21/01	80	34	pay adjustment	280.00	Scott Miller
2/04/01	80	19.5	60 hrs diff	180.00	Greg Martinez
2/18/01	80	18.5	Shift diff	160.00	Greg Martinez
3/4/01	80	13	Shift diff	160.00	Kerry Fischer
3/18/01	80	16.75	Pay adj	60.00	Greg Martinez
4/01/01	80	14.5	-none-		Rick Connell

- The timecards of November 26, 2000, December 10, 2000, and December 24, 2000 show no differential pay. Carnahan testified that sometimes Templeton forgot to include differential pay and it was either overlooked or added in at a later pay period.
- Carnahan was unable to explain precisely how the differential figure on the timecard of January 7, or any other differential amount, was computed. He testified that he tried to keep track of the times he worked in the office and make a rough estimation of what hours he performed managerial work. No written accounts of managerial time worked were kept by anyone. He could not say whether all the hours noted on the timecard as regular or overtime hours also included the $3 an hour differential pay because no records were kept. Further, Carnahan was paid regular plus differential pay for hours spent handling employee problems by supervisory cell phone away while from the facility. Those hours were not reflected on the timecards at all. According to Carnahan, the establishment of the differential pay for any pay period was an imprecise computation of all the managerial hours worked during that pay period. Carnahan said that was how it had always been done. Carnahan's testimony regarding his differential pay was sometimes confused. However, I note that the entire method of calculating the differential pay was confusing. As his general testimony is consistent with the credible testimony of Templeton, I credit Carnahan's testimony in this regard.
- Concerning the differential payment reflected on the timecard of February 18, Carnahan credibly testified that regarding this shift differential, he told Martinez that he did not recall exactly the number of hours he and Miller performed managerial work during the pay period, but that it was his best recollection for himself and Miller. Martinez said it sounded okay.

SUMMARY OF OTHER PAY (TIMECARDS OF SCOTT MILLER)					
Pay Period	Regular Hours	Over-time Hours	Other Pay:		Mgr's Approval Signature
			Explanation	Amount	
12/12/99	48	18.75	shift diff	$248.26	Jeff Templeton
8/6/00	40	22.75	fill in for sup	80.00	-no mgr sig
8/20/00	80	28	no explanation	300.22	Jeff Templeton
9/03/00	80	18.25	-none-		Jeff Templeton
9/17/00	48		32 hr floater	44.77	Jeff Templeton
10/15/00	80	37.25	shift differential	63.50	Jeff Templeton
10/29/00	-0-	-0-	shift differential	50.00	Jeff Templeton
11/12/00	58	29.75	-none-		Jeff Templeton
11/26/00	80	29	-none-		Jeff Templeton
12/10/00	80	21.75	-none-		Greg Martinez
12/24/00	80	33.25	-none-		Jeff Templeton
1/07/01	79.5	26	pay adjustment	240.00	Douglas Carnahan
1/21/01	40	13	Pay adjustment	140.00	Douglas Carnahan
2/04/01	80	20.5	60 hrs diff	180.00	Greg Martinez
2/18/01	80	19.5	Shift dif	160.00	Greg Martinez
3/4/01	80	12	[Shift dif]	160.00	Douglas Carnahan
3/18/01	80	13.5	Pay adj	60.00	Greg Martinez
4/01/01	80	9	-none-		RickConnell

- Regarding the pay period December 12, 1999, Miller testified that Luna computed and wrote in the shift differential of this timecard. Luna computed the rate as if for a long haul run although Miller was doing only local driving. Miller testified that Luna told him he had put differential pay on the timecard for performing managerial duties.
- Regarding the timecard of October 15, 2000, Miller testified that this amount and amounts on other timecards might include managerial work performed by telephone away from the Facility as well as managerial work performed at the Facility. Carnahan and Miller were instructed not to set out on the timecard the managerial hours worked. If managerial work was performed away from the Facility, the two employees were to compute the hours spent and inform the supervisor (generally Templeton) who noted the differential compensation in the "other pay" category.
- Regarding the timecard of October 29, 2000, Miller testified that the "other pay" might reflect telephone managerial work from home.
- Regarding the timecard of January 7, Miller testified that on several occasions, Templeton neglected to note differential compensation on a timecard. When that occurred, he would add it to the next timecard. According to Miller, as no pay adjustment had been made for managerial work performed in the pay period prior to January 7, the differential for the missed pay period was combined in his timecard (and consequent paycheck) for the pay period ending January 7.
- Regarding the timecard of January 21, Miller testified that the figure might include work done from home, which would be paid at the hourly rate of $17.90 plus the differential rate of $3 or $20.90. According to Miller, however, he and Carnahan did not always request the differential pay for work done from home, but merely put in for the hourly rate of $17.90.

Respondent asserts that Carnahan and Miller's inability to provide clear explanations for their differential pay precludes my accepting their testimony, arguing that the two employees "could not keep their stories straight, or even close to each other, despite eight months in which to prepare them." It is true that neither employee was able to detail any system by which they were compensated for managerial work, and neither could precisely explain the basis for any differential pay. However, their testimony is fully consistent with the credible testimony of Templeton that Respondent had no codified system for compensating the two employees and that the compensation arrangement was as unfixed and even variable as it was discretionary.

Respondent points to the high payments of January 7 and the identical payments to both employees during several pay periods after Templeton's discharge as evidence of misconduct. Those figures do not, alone, support Respondent's conclusion that the two employees falsified their timecards. Both Carnahan and Miller credibly testified that if differential pay were omitted in a pay period, it was added in the following period. The pay adjustment of January 7 is large. However, in the previous three pay periods for Carnahan and the previous four pay periods for Miller, no differential payments appear. It is not unlikely that the amount of January 7 recaptured unpaid differential pay. Moreover, the January 7 amount is not as large as that given Miller in the December 12, 1999 pay period,

which was computed by Luna. It is also not surprising that the differential amounts in early 2001 should be higher than usual since Carnahan and Miller had assumed all of Templeton's duties. As for several of the pay periods reflecting identical differential pay for the two employees, that is consistent with their sharing the managerial responsibilities. Finally, Respondent has ignored the fact that supervisors generally approved Carnahan and Miller's timecards even following Templeton's discharge. They did so in apparent cognizance and sanction of the differential amounts. There is nothing on the face of the timecards to refute the two employees' general explanations of their differential pay, and I conclude that there is no prima facie evidence of timecard falsification by either Carnahan or Miller.

5. Respondent's past practice in handling timcard and pay problems at the facility

Employee Todd William Stoddard (Stoddard) testified regarding Respondent's handling of his timecard inaccuracy. On a Friday in February, Martinez gave Stoddard a set of his photocopied timecards and asked him to check them for errors over the weekend. On the following Monday, Stoddard reported that he had found only insignificant errors. Martinez told him that Respondent had double paid him and provided photocopied timecards for additional periods. After reviewing the additional timecards, Stoddard acknowledged he been paid twice for the same run. On February 14, Stoddard emailed a letter of apology and explanation to Martinez and Watt, claiming inadvertent error and citing personal problems. On February 14, Watt sent the following email to Martinez instructing him how to handle the investigation of Stoddard's timecard inaccuracy:

> John Watt
> 2/14/2001
>
> Sent by: John Watt
> To: Greg Martinez
> Subject: Investigation
>
> 1. Are you aware that employees are required to record mileage and hours worked accurately?
> 2. Do you understand the reason for this?
> 3. Are you aware of employees who accidentally or intentionally have recorded inaccurate mileage or hours worked?
> 4. Does anyone else have relevant information about this?
> 5. Have you ever recorded mileage inaccurately?
> 6. Do you have anything to add or suggestions on what the company should do?
>
> When you ask these questions, make sure that you have all of the paperwork available and that you are confident in your findings.
>
> This may open up questions regarding other drivers, so you may want to do some checking into other reporting issues.

The following day, Martinez met with Stoddard, posed the above questions to him, and recorded his answers. A few days later, Stoddard asked Martinez if Respondent believed his story. Martinez said he believed him and that he would discuss the matter with Watt and get back to Stoddard. Stoddard continued working. A week later, Stoddard met with Watt and Martinez about the error. Watt and Martinez said they understood the situation but cautioned Stoddard to pay more attention to the accuracy of his timecards. The error amounted to an overpayment of approximately $400. Stoddard testified that he did not have to repay the money. After reviewing his timecards for a year's period, Respondent found errors in which Respondent had underpaid Stoddard. The remaining sum Stoddard owed to Respondent amounted to approximately $100, and Stoddard was not required to repay it.

Carnahan credibly testified that employee Eddie Simms and Trombley both claimed more hours than Respondent believed they actually worked. Each was notified of his mistake, and the mistake was corrected without any discipline imposed, the latter under the direction of Martinez.[14] According to Carnahan, employee Gary Edwards (Edwards) incorrectly claimed hourly pay instead of mileage pay. According to Connell, employee Cory Patton (Patton) for some period punched in 45 minutes to an hour before actually starting work, spending that time chatting with other employees. When Connell requested an explanation, Patton said he was punching in early to make sure he was credited with 40 hours of work per week. Neither Edwards nor Patton was disciplined. Although Hunter was aware of Patton's timecard falsification, he neither investigated Patton's conduct nor discussed it with him. Hunter explained, "[I] had spoken to Connell [about Patton's irregularities] before I met with Patton . . . Connell wasn't really that concerned about Patton's having clocked in early."

Luna testified that if facility employees made errors on their timecards, the practice was to ask employees for an explanation and give them an opportunity to correct errors. Templeton testified that employees frequently made mistakes on their timecards such as erroneously showing themselves as having worked. He related an incident in which an employee on vacation leave filled out his timecard showing a full week of work. Templeton told the employee to correct the errors but did not discipline him.

6. The employee handbook provision: "Inquiries by Government Representatives"

The employee handbook in effect during the relevant period is dated October 1997 and contains the following provision:

> *Inquiries by Government Representatives*
>
> From time to time, management may be called, visited or sent written communication by a representative of a federal, state, or local government agency investigating a possible violation of law or seeking other information.
>
> It is our policy to cooperate with all authorized government agencies in the legitimate pursuit of their regulatory or enforcement functions. The following procedures must be followed for all such contact other than those regarding routine forms and other communications relating to sales taxes, business licenses and permits, and routine local health inspections.

[14] Trombley corroborated Carnahan's testimony as to circumstances regarding his timecards.

If you are the person contacted, immediately notify the person in charge of your Facility. If the visit is made after hours, contact the department vice president. If this fails, call the CSC Emergency Phone Number which is posted at all company facilities. Additionally, these guidelines should be followed:

Be cordial to the person making the request. The visitor should be treated with the same courtesy as any guest at the Facility.

Do not volunteer any information, or admit or deny the truthfulness of any allegation or statement the inspector may make, nor sign any written statements, such as reports or affidavits, without express approval from a company attorney.

III. DISCUSSION

1. Respondent's union animosity

Certain statements made by Respondent's supervisors outside the 10(b) period would, if made during the 10(b) period, constitute violations of Section 8(a)(1) of the Act. While not at issue herein because an unfair labor practice may not be found based on evidence relating to events that occurred outside the 6-month limitations period, "such evidence may be used as background evidence throwing light on unlawful conduct that allegedly occurred within the limitations period." *Douglas Aircraft Co.*, 307 NLRB 536 fn. 2 (1992); *Grimmway Farms*, 314 NLRB 73, 74 (1994). Specifically, the following statements would normally be considered to violate Section 8(a)(1) of the Act: Luna's informing employees that he did not want to hire an applicant because he thought him a union plant; Luna's statement that an employee's talk about getting "organized" would get him fired; Luna's statement that if Respondent permitted glove sales it would have to permit union solicitation, which the Company couldn't have; and Martinez' statement that if there was a threat of a union organizing at the facility, Respondent would close it and deliver out of California. Even assuming the supervisors' statements did not rise to the level of Section 8(a)(1), they may be considered as background evidence of animus toward employees' union support. *Bakersfield Californian*, 337 NLRB 296 (2001). I find, therefore, that at all times material hereto, Respondent bore animosity toward employee union activity.

2. The terminations of Carnahan and Miller

The evidence discloses that Respondent harbored general animosity toward employee unionization. On May 6, Respondent learned that Carnahan and Miller were leading union organizing activity at the facility. On May 10, Respondent discharged Carnahan and Miller. The question is whether Respondent's animus toward Carnahan's and Miller's activities prompted their terminations. I analyze the lawfulness of Carnahan's and Miller's terminations by applying the Board's analytical framework set out in *Wright Line*.[15] Under this framework, the General Counsel must make a prima facie showing sufficient to support an inference that animosity toward the two employees' protected activities was a motivating factor in their terminations. The prima facie case may be established by proving the following four elements: (1) the alleged discriminatee engaged in union or protected concerted activities; (2) Respondent knew about such activity; (3) Respondent took adverse employment action against the alleged discriminatee; and (4) there is a link or nexus between the protected activity and the adverse employment action. *Hays Corp.*, 333 NLRB 1250 (2001); *Briar Crest Nursing Home*, 333 NLRB 1935 (2001). The first three elements are clearly established herein. The pivotal factual inquiry in determining whether the General Counsel has made a prima facie showing involves the fourth element, i.e., whether there is a link or nexus between Carnahan and Miller's union activities and their terminations.

In resolving the question of whether a link or nexus exists, it is necessary to determine, if possible, Respondent's motive in terminating the two employees. If the evidence shows that animosity toward Carnahan and Miller's union activities formed any part of the basis for their terminations, then the General Counsel has made his prima facie case. Once the General Counsel has made his prima facie case, the burden shifts to Respondent to show, in essence, that it would have taken the same action for nondiscriminatory reasons, even in the absence of protected activity.

Motive is a question of fact, and the Board may infer discriminatory motivation from either direct or circumstantial evidence and the record as a whole. *Tubular Corp. of America*, 337 NLRB 99 (2001). Indications of discriminatory motive may include expressed hostility toward the protected activity,[16] abruptness of the adverse action,[17] timing,[18] pretextual reason,[19] disparate treatment,[20] departure from past practice,[21] and/or the employer's inability to adhere to a consistent explanation for the action.[22]

Here, there is no overt evidence of union animus directed specifically toward Carnahan and Miller's union activities. However, direct evidence of union animus is not required, *Fluor Daniel, Inc.*, 304 NLRB 970 (1991). There are circumstances, set forth below, from which it is reasonable to infer unlawful motivation in the discharges of Carnahan and Miller.[23]

3. Improbable basis for investigation

Respondent has failed to state a congruous reason for beginning any investigation of Carnahan's and Miller's timecards. No facility supervisor or employee pointed out improprieties in Carnahan's and Miller's differential pay. According to Hunter, it was Carnahan's and Miller's ethics hotline reports regarding a supervisory vacancy that first flagged his attention to a

[15] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[16] *Mercedes Benz of Orland Park*, 333 NLRB 1017 (2001).

[17] *Dynabil Industries*, 330 NLRB 360 (1999).

[18] *Bethlehem Temple Learning Center*, 330 NLRB 1177 (2000).

[19] *KOFY TV-20*, 332 NLRB 771 (2000); *Fluor Daniel*, 311 NLRB 498 (1993).

[20] *NACCO Materials Handling Group*, 331 NLRB 1245 (2000).

[21] *Sunbelt Enterprises*, 285 NLRB 1153 (1987).

[22] *Atlantic Limousine, Inc.*, 316 NLRB 822 (1995).

[23] Respondent argues that the General Counsel has failed to show that the discharges had an impact on any employee's decision to join a union. That is not relevant. The subjective reaction of employees is not a determinative consideration in unlawful discharge cases.

driver/supervisor income disparity. That is implausible. The ethics report of Miller's call notes only that Miller said he did not apply for the vacant supervisory position because of pay issues, and the ethics report regarding Carnahan is silent about the supervisory position. The substance of Carnahan's and Miller's ethics hotline reports was their dissatisfaction with facility supervision. Viewed objectively, there is nothing in the reports reasonably to create suspicion of the two employees' pay arrangements.

Further, there is no credible reason why supervisor/driver pay disparity should spark an investigation. In 2000, 10 out of 16 (or 63 percent) of facility drivers made more money annually than their direct supervisor. There is no credible evidence that the disproportion was anomalous or unknown to Respondent. The differing incomes generally resulted from the drivers' opportunities for overtime and/or mileage work and must have been well known to Respondent. It stretches credulity to accept Respondent's claim that supervisor/driver pay disparity formed a basis for the investigation. Moreover, Martinez offered an entirely different reason as catalyst for the investigation. While Martinez' explanation—that he learned Luna had only agreed to $1 differential for Carnahan and Miller—has the merit of being logical, his lack of credibility generally and the conflicting testimony of Respondent's witnesses prevent my accepting his account.

Respondent has put forth no cogent reason why it should have commenced an investigation into Carnahan and Miller's timecards, and I am forced to conclude that the proffered reasons are false. False explanations for an employer's actions support an inference that the true motive is an unlawful one. *Electronic Data Systems Corp.*, 305 NLRB 219 (1991). Similarly, the absence of a cogent basis for an investigation may create an inference of unlawful motive. *Tubular Corp. of America*, supra. In these circumstances, it is reasonable to conclude that the motivation for the investigation was Respondent's knowledge of the two employees' union activities or their stated dissatisfaction with their supervision, either of which is protected.

4. Limited scope of investigation

In conducting his investigation, Hunter relied almost solely on timecards and driver route forms to conclude that Carnahan and Miller falsified their timecards. Hunter must have been aware that timecards at the facility were informally filled out as a consequence of his involvement in Patton's timecard problem. He was also fully aware that differential pay in some amount had been authorized for Carnahan and Miller for over a year. It is reasonable to expect that Hunter was also aware that inaccurate information was recorded on Fischer's timecard to enable Respondent to compensate him for supervisory work. Those facts reasonably should have suggested to Hunter that unofficial data might underpin Carnahan and Miller's differential pay. Yet Hunter did not interview any employees or supervisors to determine if the reviewed documents of Carnahan and Miller were accurate or susceptible to other interpretations. He did not, apparently, even inquire of Martinez or Luna how managerial work hours were reckoned for the two employees. Further, Hunter did not conduct discussions of any depth with Carnahan or Miller, granting them only very brief termination interviews. Finally, although Carnahan and Miller raised significant issues in their curtailed termination interviews, e.g., that the route documents did not accurately reflect their time in the office and that they had done managerial work away from the facility, Hunter dismissed their defenses out of hand. Hunter did not even ask the attending supervisors about the employees' contentions before he turned the interviews over to Martinez to effect termination. Hunter has given no justification as to why he omitted obvious investigatory steps. He also failed to explain why Carnahan and Miller were so summarily dealt with. Respondent offered no evidence of any exigent circumstances to compel its precipitate actions. Carnahan and Miller were no longer in any supervisory position. They could no longer approve their or any other employee's timecards. There was no danger of their compromising Respondent's pay system. Without some explanation, the rush to judgment and penalty is, at the very least, suspicious. The manner of investigation, including the failure to permit the two employees the opportunity to answer allegations raised by the investigation, may point to a discriminatory motive. *Tubular Corp. of America*, supra. See also *Service Technology Corp.*, 196 NLRB 1036 (1972). In the above circumstances, it is reasonable to infer that Respondent conducted a truncated investigation of Carnahan and Miller in order to achieve a predetermined result. It is also reasonable to infer that Respondent's motivation in doing so was discriminatory.

5. Falsity of Respondent's stated reasons and timing of the terminations

Having concluded the proffered reasons for an investigation of Carnahan's and Miller's timecards are false, I consider that the fabrications cast doubt on Respondent's accounts of its pretermination management discussions. There being little credible testimony of what led up to the terminations, I am left with an evidentiary void on what, if any, management decisions were reached before Respondent learned of the two employees' union activity. There are, therefore, only three credible and unambiguous facts regarding the timing of the terminations and Respondent's knowledge of the employees' union activities: (1) on May 6, Respondent, through Luna, learned of Carnahan's and Miller's union activities; (2) on May 7, Luna informed Watt of Carnahan's and Miller's union activities; and (3) on May 10, Respondent fired Carnahan and Miller. The discharges fell suspiciously fast on the heels of Respondent's knowledge. Evidence of falsity of an asserted reason for adverse action and suspicious timing support an inference of unlawful motive. *Daikichi Sushi*, 335 NLRB 622, 625 (2001), *Adco Electric*, 307 NLRB 1113, 1128 (1992).

6. Disparate treatment

Even assuming Respondent believed Carnahan and Miller were guilty of falsely recording work hours, Respondent accorded them glaringly different treatment from that afforded other employees. Stoddard is the most striking example. He inaccurately claimed compensation for a run he had not worked. Respondent gave Stoddard over a week to examine his timecards in order to identify any error or infraction. Only after that period was Stoddard asked for an explanation. When

Stoddard acknowledged his mistake, Respondent administered only a verbal caution even though his mistake resulted in a $400 overpayment. In contrast, Respondent gave Carnahan and Miller virtually no time to review their timecards and driver route forms or to formulate responses. The different treatment cannot be explained as merely a difference in supervisory techniques between upper and local management. Upper management knew how Stoddard's problem was handled as Watt was involved in that investigation and discipline as well as Carnahan's and Miller's.

In its brief, Respondent provided various explanations as to why Carnahan and Miller were treated differently from other employees. As for Edwards' and Trombley's situations, Respondent asserted that their inaccuracies were due to innocent error. As to Patton, although Respondent admitted he clocked in and did not go straight to his duties, Respondent said that he did not "deny, conceal and blame" and that "[h]anging out or loafing occasionally while on the clock is an unavoidable occurrence at any Facility." In contrast, Respondent asserts, Carnahan and Miller's "practiced falsification" represented timecard abuse. Respondent's distinctions are not persuasive. Patton's timecard padding was deliberate, ongoing, and an admitted effort to increase his weekly pay. In Patton's case, Respondent clearly failed to follow the "zero tolerance" policy it emphasized with Carnahan and Miller. As to Stoddard's timecard problem, Respondent did not attempt to distinguish that situation. I conclude that there is no legitimate justification for the unequal treatment. It is reasonable to infer that Carnahan and Miller were treated differently because of Respondent's animosity toward their union activities. See *Metro Networks*, 336 NLRB 63 (2001).

7. Abruptness of the discharges

Without any forewarning, Hunter met with Carnahan and Miller separately for only 15 to 25 minutes each. During the brief interview periods, each employee was asked to examine numerous documents and give an explanation for the data. When no explanation satisfactory to Respondent was proffered, each employee was abruptly terminated. The wording of the script followed by Hunter strongly suggests that no conclusion other than termination was seriously considered. Thus, according to the script, even if a "believable explanation" were proffered by Carnahan or Miller, the employee was to be suspended and encouraged to resign. Respondent's abrupt and implacable approach to the discharges justifies a further inference that they were discriminatorily motivated.

Based on the above considerations, I conclude the General Counsel has established the fourth element of a prima facie showing of an 8(a)(3) violation by establishing that antiunion sentiment was a substantial or motivating factor in the terminations of Carnahan and Miller. The burden consequently shifts to Respondent to establish persuasively by a preponderance of the evidence that it would have terminated Carnahan and Miller for nondiscriminatory reasons, even in the absence of protected activity.[24] *Avondale Industries*, 329 NLRB 1064 (1999); *T&J Trucking Co.*, 316 NLRB 771 (1995). The Board's role is then to ascertain whether Respondent's proffered reasons for personnel actions are the actual ones. *Detroit Paneling Systems*, 330 NLRB 1170, 1175 (2000), and cases cited therein. I conclude Respondent has failed to sustain its burden, and I further conclude that its asserted reasons for the discharges of Carnahan and Miller are pretextual. It follows that Respondent violated Section 8(a)(3) and (1) of the Act when it discharged Carnahan and Miller.[25]

Respondent contends that Carnahan and Miller did not engage in protected activity because they were supervisors during their union organizing attempt. Respondent does not contend that either employee was a supervisor after Connell assumed the traffic supervisor position on March 18. It is clear that neither Carnahan nor Miller possessed any supervisory authority from March 18 until their terminations, during which time they actively engaged in a union organizing attempt. Nonetheless, Respondent argues that any supervisory status they may have had prior to March 18 carries forward and precludes the protection of the Act at the time of their discharges. The cases cited by Respondent are inapposite.[26] I find no merit in Respondent's argument.

8. The employee handbook provision: "Inquiries by Government Representatives"

The language of Respondent's employee handbook provision: "Inquiries by Government Representatives" is so broad as to encompass employee's rights under the Act to use the Board's processes. The provision plainly prohibits employees from volunteering information to a Federal agent or signing any written statement such as an affidavit without express approval from a company attorney. Seeking employee information and obtaining affidavits are both normal Board investigatory procedures, and Section 8(a)(4) of the Act specifically prohibits discrimination against any employee because he or she has given testimony in a Board investigation. Respondent's provision, in requiring employees to obtain preapproval from a company attorney, necessarily restrains and coerces employees in their right to provide evidence to Board agents or to testify in Board proceedings. At the very least, it would require an employee to divulge his or her identity to the company as someone interested in the Board or in whom the Board is interested. In addition to chilling employees' unrestrained involvement in Board processes, the provision effectively acts as a form of interrogation. In either instance it restrains and coerces employees in the exercise of their Section 7 rights.

[24] A "preponderance" of evidence means that the proffered evidence must be sufficient to permit the conclusion that the proposed finding is more probable than not. McCormick, *Evidence*, at 676–677 (1st ed. 1954).

[25] The evidence is compelling that Respondent's conduct was discriminatory under the Act. As the evidence clearly indicates that Carnahan and Miller's union activity was the primary catalytic factor, I find it unnecessary to discuss the possibility that Respondent's discrimination was also, or alternatively, prompted by Carnahan's and Miller's ethics hotline complaints.

[26] *Dejana Industries*, 336 NLRB 1202 (2001); *Alton Belle Casino*, 314 NLRB 611 (1994); *Schnuck Markets, Inc. v. NLRB*, 961 F.2d 700 (8th Cir. 1992); *Children's Habilitation Center, Inc. v. NLRB*, 887 F.2d 130 (7th Cir. 1989); *NLRB v. St. Mary's Home, Inc.*, 690 F.2d 1062 (4th Cir. 1982).

Respondent contends that the provision clearly applies only to members of management as evidenced by its introductory paragraph: "From time to time, *management* may be called, visited or sent written communication by a representative of a federal, state, or local government agency investigating a possible violation of law or seeking other information." (Emphasis added.) Respondent also argues that the provision is unrelated to union activity or to the NLRB. I cannot accept Respondent's arguments. The provision appears in a handbook given to each employee, and employees have never been told the provision did not apply to them. It is reasonable to conclude that employees would believe the provision governed their interaction with government agents, including Board investigators, or their testimony at Government proceedings, including Board proceedings. Moreover, even assuming the provision referred only to supervisors, the Act also protects supervisors from discrimination by an employer for assisting employees in proceedings before the Board. *Bechtel Power,* 248 NLRB 1257 (1980).

It is not material for purposes of an 8(a)(1) analysis that Respondent never enforced the "Inquiries" provision or ever specifically brought it to employees' attention. The mere maintenance of such a rule would reasonably be expected to "chill" employees in exercising the right of access to the Board. See *Brockton Hospital,* 333 NLRB 1367 (2001). Accordingly, I find that Respondent, by maintaining the provision, has violated Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. By discharging Douglas Carnahan on May 10, 2001, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

2. By discharging Scott Miller on May 10, 2001, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

3. By maintaining the employee handbook provision: "Inquiries by Government Representatives," Respondent has interfered with, restrained, and coerced employees in the exercise of the rights guaranteed by Section 7 of the Act in violation of Section 8(a)(1) of the Act.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Respondent having discriminatorily discharged employees Douglas Carnahan and Scott Miller, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Respondent also must remove from its files any reference to the unlawful discharges of Douglas Carnahan and Scott Miller and thereafter notify each employee in writing that this has been done and that the discharge will not be used against him in any way.

[Recommended Order omitted from publication.]